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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 679

GORDON SMITH,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

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SUBJECT INDEX

	Page
Caption	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Argument and Authorities on Jurisdiction and Reasons for Denying Certiorari	5
Conclusion	17

LIST OF AUTHORITIES

Cases	Page
American Surety Co. v. Baldwin, 287 U.S. 156	9
Bollin v. Nebraska, 176 U.S. 83	9
Bowe v. Scott, 233 U.S. 658	9
Brown v. Massachusetts, 144 U.S. 573	10
Capital Nat. Bank v. Cadiz First Nat. Bank, 172 U.S. 425	9
Capin v. Fye, 179 U.S. 127	9
Denney v. Des Moines, 173 U.S. 193	9
Edelman v. California, 97 L.Ed. 227	10
Erie R. Co. v. Purdy, 185 U.S. 148	10
Fisher v. State, 107 Tex. Crim. 383, 2 S.W. 2d 249	11
Gorman v. Washington University, 316 U.S. 98	11
Harvel v. State, 126 Tex. Crim. 581, 72 S.W. 2d 604	11
Herndon v. Georgia, 295 U.S. 441	9
Hulbert v. Chicago, 202 U.S. 275	10
Jacobi v. Alabama, 187 U.S. 133	10
Kedkuk Bridge Co. v. Illinois, 175 U.S. 626	9
Lawlee v. Walker, 14 How. 149, 14 L.Ed. 364	9
Loeb v. Columbia Twp., 179 U.S. 472	11
Maxwell v. Newbold, 18 How. 511, 15 L.Ed. 506	9
Michigan Sugar Co. v. Dix, 185 U.S. 291	8
Mutual Life Ins. Co. v. McGrew, 188 U.S. 291	9, 10
New York Cent. R. Co. v. New York, 186 U.S. 269	9, 10
Oxley Stave Co. v. Butler County, 166 U.S. 648	6, 9, 10
Spies v. Illinois, 123 U.S. 131, 31 L.Ed. 80	10
Thomas v. Iowa, 209 U.S. 258	9, 16

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Page

White River Lumber Co. v. Arkansas ex rel Applegate, 279 U.S. 692 16

Whitney v. California, 274 U.S. 357 16

Winona Land Co. v. Minnesota, 159 U.S. 540 9

Zweiz v. State, 74 Tex. Crim. 306, 171 S.W. 747 11

Statutes

United States Statute:
28 U.S.C. 1257(3) 2, 5

Constitution of United States:

Fifth and Sixth Amendments 2

Fourteenth Amendment 2, 3, 4, 6

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Opinion Below

The opinion below of the Court of Criminal Appeals is reported at 273 S.W. 2d 623 and a copy of said opinion appears in Petitioner's Application in the Appendix thereto, pages 23 to 27. Said opinion was rendered and entered on November 10, 1954. A motion for rehearing was overruled without a written opinion on January 5, 1955. On motion made by Petitioner, the Texas Court of Criminal Appeals on January 19, 1955, revoked its mandate and ordered a stay of proceedings for ninety days to permit filing of Petitioner's Application for a Writ of Certiorari in this Honorable Court.

Jurisdiction

This Court does not have, nor should it exercise, jurisdiction under 28 U.S.C., 1257(3) because:

1. Nowhere in the trial record, and particularly in the Bills of Exceptions in the trial court, did Petitioner specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

2. The particular federal questions now sought to be raised in this Court were at no time presented to nor considered by the trial court or the Court of Criminal Appeals, and are being for the first time presented in the Application to this Court for Writ of Certiorari.

3. The decision of the Court of Criminal Appeals rests upon non-federal grounds which support its holdings.

4. The Fifth and Sixth Amendments to the Constitution of the United States apply only to the Federal Government and not to the States.

Respondent's argument in support of these jurisdictional points are made below under the heading "Argument and Authorities on Jurisdiction and Reasons for Denying Certiorari."

Questions Presented

1. Has this Court jurisdiction to consider an alleged violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States

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(a) Where Petitioner never suggested nor presented to the trial court or to the Court of Criminal Appeals any reference to a federal question involving a violation of the due process clause of the Fourteenth Amendment,

(b) where the Court of Criminal Appeals did not consider nor determine any issues relating to the Fourteenth Amendment; and

(c) where, following a decision by the Court of Criminal Appeals, Petitioner again failed, in a motion for rehearing, to specially set out or claim any title, right, privilege or immunity under the Constitution of the United States?

2. Assuming, *arguendo*, that jurisdiction exists, did the Court of Criminal Appeals in affirming the trial court, deny Petitioner due process guaranteed by the Fourteenth Amendment of the Constitution of the United States?

Statement

(Respondent's record references are to the Statement of Facts and to the Transcript on file in the Court of Criminal Appeals of Texas.)

Petitioner, upon jury trial held in a District Court of Texas, was convicted of the offense of murder without malice (Tr. 16, 17). On appeal to the Court of Criminal Appeals of Texas, Petitioner contended (along with other alleged errors not before this Honorable Court for consideration) that the trial court erred in submitting paragraph 9 (Tr. 13) and para-

graph 7 (Tr. 12) of its charge to the jury, and in its refusal to give a requested charge on the law of circumstantial evidence (Tr. 5, Sup. Tr. 20). The only basis for his objection made in the trial court (Sup. Tr. 20) to the said paragraph 9 was that it "*requires of the defendant a greater burden* (of proof) *than is required by law.*" His objection in the trial court to the charge contained in paragraph 7 was that it was "*misleading to the jury,*" was "*a comment on the weight of evidence,*" .... "*places a greater burden of proof on the defendant than is required by law,*" . . . "*assumes that the said Susanna Martinez was killed,*" and "*is unintelligible, confusing and misleading to the jury*" (Sup. Tr. 19). No specific ground was given in the trial court for his objection to the failure to give a charge on the law of circumstantial evidence.

In his appeal brief to the Court of Criminal Appeals, Petitioner's sole argument was that the trial court committed reversible error for the same reasons upon which he bases his objections in the trial court and attempted by an extensive brief of State court decisions to show that the action complained of in the trial court was contrary to prior State decisions. There was no attempt made by Petitioner to specifically raise a federal question or claim.

Affirming the judgment of the trial court, the Court of Criminal Appeals in its opinion said nothing to even infer or intimate that the Court considered it had before it a federal question for decision, nor did the opinion use any language which might even remotely refer to *due process, Fourteenth Amendment,* or the *Constitution of the United States.* Even more indicative was the fact that *not*

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one single federal case was cited in the entire opinion.

Petitioner then filed his Motion for Rehearing which was substantially a rehash of what had been relied on in his original brief to that Court. Not one single Federal case was cited, nor was the word Constitution even mentioned in such Motion for Rehearing. Rehearing was denied by the Court of Criminal Appeals without a written opinion.

A motion was then filed by Petitioner to withdraw the mandate in order for him to make Application to this Honorable Court for Writ of Certiorari and, at the same time, alleging that his application was to be based upon certain alleged infringements of Petitioner's constitutional rights. Here, for the first time, Petitioner specially set up or claimed a denial of his constitutional rights. Any contention that a federal question was raised at this point by a motion to withdraw the Court's mandate and that it was passed on by the highest court of this State is considered by Respondent so unmeritorious and frivolous as to be unworthy of further argument.

Argument and Authorities on Jurisdiction and Reasons for Denying Certiorari

It is respectfully submitted that Petitioner has not complied with the requirements of 28 U.S.C. 1257(3) sufficiently to invoke the jurisdiction of this Court, in that he has failed in State courts to specially set up or claim any title, right, privilege or immunity under the Fourteenth Amendment to the Constitution of the United States. Nowhere in the trial court record, and particularly in his Bills of

Exceptions, did Petitioner use any language or phraseology which could reasonably be said to notify the trial court of any federal question now being urged or that he was contending that his federal constitutional rights or privileges were being infringed upon. His objections and exceptions were couched in such seemingly state procedural terms as "*being contrary to law*," "*Wrongfully shifts the burden of proof to defendant*," "*misleading to the jury*," "*contrary to law*," etc. At no point in the state court proceeding did Petitioner use even such vague terms as "*denies due process*," "*unconstitutional*" or "*Fourteenth Amendment*"—much less did he point out an alleged specific violation of the Fourteenth Amendment of the Federal Constitution. It is here urged by Respondent that by the use of such vague terms as were urged by Petitioner all of the way through the State courts until after his Motion for Rehearing in the Court of Criminal Appeals had been denied, Petitioner could not and did not sufficiently raise a federal issue under the long line of decisions by this Honorable Court.

As early as 1897, in the case of *Oxley Stave Co. v. Butler County*, 166 U.S. 648, this Honorable Court laid down the rule that the jurisdiction of the Supreme Court to re-examine the final judgment of a state court cannot arise from a mere inference but only from averments so distinct and positive as to place it *beyond question* that the party bringing a case to it from the state court intended to assert a federal right. Respondent is of the firm belief that the *Oxley Stave* case is decisively controlling in the case in hand since in both cases the sole objections and exceptions raised in the state courts were

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couched in terms of state procedural law, wholly void of any reference to the Constitution of the United States. Therefore, Respondent will take the liberty to extensively quote from the Opinion of Mr. Justice Harlan in that case as follows:

> "... But it [the Supreme Court of the United States] can not review such final judgment even if it denied some title, right, privilege, or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege, or immunity was 'specially set up or claimed' in the state court as belonging to such party under the Constitution, or some treaty, statute, commission, or authority of the United States. Rev. St. No. 709.
>
> "Looking into the record, *we do not find any reference was made in the court of original jurisdiction to the Constitution of the United States.* Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege, or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question.
>
> "... The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons, as well as in the absence of necessary parties, who had no opportunity to be heard in vindication of their rights. *Do such general allegations meet the statutory requirement* that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under

the Constitution or authority of the United States? *We think not.* The specific contention *now* is that the decree of the Butler County Circuit Court in the suit instituted by the County of Butler was not consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. But can it be claimed that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring—*without referring to the Constitution, or even adopting its phraseology* —that the decree was passed against deceased persons, as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in Section 709 of the Revised Statutes." (Emphasis supplied throughout. This brief.)

The rule was again re-affirmed by this Court in the case of *Michigan Sugar Co.* v. *Dix,* 185 U.S. 291 (1902) wherein Mr. Chief Justice Fuller used this language:

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the 3rd division of § 709, can not arise from mere inference, but only from averments so distinct and positive as to place it *beyond question* that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met *unless the party unmistakably declares* that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission, or authority, of the United States."

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And this Court has held that the clause in the Constitution or the law of Congress under which the Federal right is claimed must be specified in the State court. *Maxwell v. Newbold*, 18 How. 511, 15 L. Ed. 506 (1856); *Lawlee v. Walker*, 14 How. 149, 14 L. Ed. 364 (1852). See also *New York Cent. R. Co. v. New York*, 186 U.S. 269 (1902); *Chapin v. Fye*, 179 U.S. 127 (1900); *Kedkuk Bridge Co. v. Illinois*, 175 U.S. 626 (1900); and that the claim must be unmistakable and not left to mere inference, *Winona Land Co. v. Minnesota*, 159 U.S. 540 (1895); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903); *Bollin v. Nebraska*, 176 U.S. 83 (1900); *Denney v. Des Moines*, 173 U.S. 193 (1899) *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897).

This Court should not entertain jurisdiction to review final judgment of a state court upon an alleged federal right where the only objections in the State court were raised solely as a matter of State law. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932) and objections made in the state court couched in the following language have been held not to sufficiently raise a federal question: "contrary to law," *Capital Nat. Bank v. Cadiz First Nat. Bank*, 172 U.S. 425 (1899); "denial of due process," *Bowe v. Scott*, 233 U.S. 658 (1914); *Thomas v. Iowa*, 209 U.S. 258 (1908); "Judgment void because of no breach of condition of surety bond, and had been entered without notice to the party, and was contrary to good conscience and equity," *American Surety Co. v. Baldwin*, supra. Also, the mere reference in the state court to the "Constitution of the United States," *Herndon v. Georgia*, 295 U.S. 441 (1935); or the "Constitution and laws of the United

States," *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897), is insufficient.

In view of the above pronouncements of this Honorable Court, it is respectfully submitted that a review of the entire record of the trial court will reveal an absolute failure on the part of Petitioner to specially set up or claim a federal question in the trial court or in the appellate court.

Not only must Petitioner specially set up or claim his alleged federal right, but he must also raise the federal question at the proper time and in the proper way. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903). The proper time is in the trial court when required by the state practice. *Spies v. Illinois*, 123 U.S. 131, *sub nom. ex parte Spies*, 31 L. Ed. 80 (1877); *Jacobi v. Alabama*, 187 U.S. 133 (1902); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1902); See also *Hulbert v. Chicago*, 202 U.S. 275 (1906), (Complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573 (1892), (Failure to raise question before verdict held to be fatal); *Edelman v. California*, 97 L. Ed. 227 (question raised for first time as one of grounds for appeal); *Mutual Life Ins. Co. v. McGrew* supra, (failure to raise question in both trial court and on appeal), and it can not be denied under Texas procedure the question must be raised in the trial court since the scope of review by the Court of Criminal Appeals is limited to grounds or assignments of error which a defendant has preserved by an adequate Bill of Exceptions, and Motion for a New Trial in the trial court. The Texas Court has expressly held that such motions as are not thus set up or assigned cannot be considered by it on appeal.

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Zweig v. State, 74 Tex. Crim. 306, 171 S.W. 747; *Harvel v. State*, 126 Tex. Crim. 581, 72 S.W. 2d 604; *Fisher v. State*, 107 Tex. Crim. 383, 2 S.W. 2d 249.

Thus it can be seen that Petitioner must specifically set up his claim and raise it in the trial court in the proper manner. *Loeb v. Columbia Twp.*, 179 U.S. 472 (1900), and the burden is upon him to affirmatively show that he has done so, since he is required to show affirmatively that this Court has jurisdiction. *Gorman v. Washington University*, 316 U.S. 98 (1942).

Has Petitioner discharged this burden? It is respectfully submitted that he has not. In fact, it is difficult to determine, even after careful study of his Application to this Court, the precise federal question alleged to have been set up and raised in the trial court and which same he is asking this Honorable Court to decide. In his Application (page 3) under the heading "Questions Presented for Review," he submits the following questions:

> "Question No. 1: In a State Court criminal prosecution, will the trial court be permitted to require of the defendant that he prove, or at least present sufficient proof to raise a reasonable doubt in the minds of the jury, that he was not guilty of one of the essential elements of the offense charged?"
>
> "Question No. 2: In the trial of a state court criminal case, will the trial judge be permitted to assume in the language of his charge to the jury that one of the essential elements of the offense charged should be taken as established in the absence of an admission thereof by the defendant?"

> "Question No. 3. In a state court prosecution for murder with a motor vehicle while under the influence of intoxicating liquor, when the record reveals there were no eye witnesses and no direct evidence pertaining to the identity of the driver of said automobile at the time of the collision, can the trial court deny the defendant a charge upon the law of circumstantial evidence with respect to whether or not the defendant was the actual driver of the automobile involved in the collision?"

Even though it is said these are the questions for this Court's review, are they in reality the federal questions he relies upon to have been answered wrong by the Court of Criminal Appeals? Are they even federal questions at all? It is submitted by Respondent that they are not. Even in submitting his supposed federal questions to the Supreme Court of the United States, he has again failed to include a reference even to the vague term "due process." He has not said "Is a defendant denied due process if the trial court does these things," or words to that effect.

Assuming it is implied that Petitioner *infers* his question to be that if the trial court does certain things, i.e., "require defendant to prove one of the essential elements of the offense charged," or "the trial court charge assumes one of the essential elements to be taken as established" or "refused to give a charge on law of circumstantial evidence when there is no direct evidence"—then does such action deny the due process guaranteed by the Fourteenth Amendment of the Constitution of the United States. If this is his true federal question, then did

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the Court of Criminal Appeals undertake to pass upon it as required under this Court's decisions before it will undertake a review? Certainly not!

A review of the opinion will reveal only that the Court of Criminal Appeals held that under the State law (1) the charge as worded *did not* require the defendant to prove one of the essential elements of the offense, (2) the wording of the charge *did not* assume one of the essential elements to be taken as established, and (3) that *there was* in effect direct evidence, hence no circumstantial evidence charge was required. The court *did not* find that the trial court's charge shifted the burden of proof to the defendant, or that there was an assumption of one of the elements as true or that there was no direct evidence. If it had so found these things and then held that, even so, defendant was not denied "due process" then it could be said that they had decided a federal question.

Attention is further called to the fact that in the entire opinion of the State court not one single federal court case was cited nor did it in any way refer to "due process" or to the Fourteenth Amendment of the Constitution of the United States. The very wording of the questions, which Petitioner has submitted as the questions to be answered by this Court, reveals their impropriety since by an answer in his favor this Court would be *assuming* as untrue the very things which the Court of Criminal Appeals has expressly passed upon.

Respondent respectfully submits that before this Honorable Court should invoke its jurisdiction to review the decision of the highest court in the State, Petitioner's federal question should have been

whether or not, by its charge, the trial court did, in fact, improperly place the burden of proof of one of the essential elements on the defendant, assumed one of the essential elements to be taken as true, or failed to give a charge on the law of circumstantial evidence when there was no direct evidence in the case, and if the Court did either or all of these three things, did such action deny the defendant of his right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and such question must have been properly raised in the trial court. It cannot be said by any stretch of the imagination that such question was ever properly set up, presented to or passed upon by the trial court in this case.

In what court, or at what point in the State court proceeding, does the Petitioner claim that he was denied due process of law? The attention of this Honorable Court is further called to the fact that in spite of Petitioner's Application expressly submitting the above questions—all of which seem to complain of the action *in the trial court*—as the federal questions to be answered by this Honorable Court, yet not even once did he urge or allege that the *trial court* denied him due process of law, but instead, on page 2 of his Application, under the heading "Grounds on Which the Jurisdiction of this Court is Invoked" he urges the jurisdiction of this Court because

> "In each of the three particulars specified below, this Applicant has been denied due process of law . . . :

"(a) the opinion of the *Texas Court of Criminal Appeals* approved the action of the trial court . . .

"(b) the *Texas Court of Criminal Appeals* has deprived the Applicant of his essential right of trial by jury . . .

"(c) the *Texas Court of Criminal Appeals* has approved the action of the trial court in refusing to charge . . ."

In spite of the fact that the three specific federal questions sought to be reviewed by this Court, complain of the action in the *trial court*, yet, he is here urging this Court that the grounds on which he would invoke jurisdiction is that the Court of Criminal Appeals denied Applicant due process. Thus, is it not true that the actual federal question raised by the wording of Petitioner's Application is whether or not he was denied due process by the Court of Criminal Appeals instead of by the trial court? Such a question would be untenable as raising a federal question since it is alleged on page 2 of his Application, the Court of Criminal Appeals denied him due process of law *because* it approved the action of the trial court in doing such things as depriving the defendant of his presumption of innocence, assuming an essential element of the offense as proved, and failing to give a circumstantial evidence charge when there is no direct evidence. A review of the record and particularly the opinion of the Court of Criminal Appeals, as has already been

mentioned, shows that such was not the ruling of the Court of Criminal Appeals and therefore this could not be a federal question which can be said to have been decided incorrectly by the highest court of this State.

It appears that Petitioner is somewhat confused as to what precise federal question he is claiming to have seasonably raised at the proper time and in the proper State court. It is respectfully submitted that the true reason is that no substantial federal question has in fact been raised at all in the State court and that a federal question is being urged now for the first time on Application for Writ of Certiorari, which this Court has repeatedly held cannot be done. *White River Lumber Co. v. Arkansas, ex rel Applegate*, 279 U.S. 692 (1929); *Whitney v. California*, 274 U.S. 357 (1927); *Thomas v. Iowa*, 209 U.S. 258 (1908). Petitioner's only objections being so generally framed in language of State procedural law as to fail to apprise the State Court of the precise federal right claimed, he gave the trial and appellate courts below no federal question to decide, and such having occurred, this Court is without jurisdictional basis to grant a writ of certiorari. It is submitted that even if a federal question can be inferred to have been raised in the state court, such question was not raised in the trial court as required by State procedure. Or, if a federal question was properly before the Court of Criminal Appeals, that Court did not find it necessary to base its decision on the merits, if any, but that adequate State grounds existed for final determination of the cause.

Conclusion

For the foregoing reasons, Petitioner's Application for Writ of Certiorari should be denied.

Respectfully submitted,

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May....., 1955

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to the following attorneys of record: for Applicant Karl L. Lovelady, Muleshoe, Texas; Harold O. Harriger & Nelson & McCleskey, Central American Life Building, Lubbock, Texas (First Class Postage Prepaid).